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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-128
Implementation of the Pay Telephone	)	
Reclassification and Compensation	)	
Provisions of the	)	
Telecommunications Act of 1996	)	

Opposition to Sprint's Motion To Require Production of a Confidential Cost Study and Conditional Cross-Motion for Production of Payphone Cost Data from Sprint and AT&T

Bell Atlantic[1] opposes Sprint's motion for an order requiring Bell Atlantic to make public a confidential cost study prepared for, submitted to and placed under seal at the Massachusetts Department of Public Utilities ("DPU").[2] Bell Atlantic has not sought to rely on this study in this proceeding. Sprint's motion should be denied for three reasons.

First, the motion is an attempted end run around the protective agreements entered at the DPU. Because the study was prepared for the Massachusetts DPU and it was that agency which established the procedures to protect it, Sprint should seek relief from that agency, not from the Commission.

Second, Sprint can show no justification for requiring the production of this study. The study relies on *incremental* costs — a measure of costs the Commission specifically has rejected in the context of payphone compensation, and, therefore, the study cannot be relevant to this proceeding.

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[1] The Bell Atlantic telephone companies are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company and New England Telephone and Telegraph Company.

[2] Motion To Require Production of Cost Study at 1 (Sept. 16, 1997) ("Sprint Motion").

Third, the information in question relates to Bell Atlantic's costs of providing a competitive service, information that is confidential to Bell Atlantic and of a type that courts and regulatory agencies recognize should not be indiscriminately disclosed. Especially given its irrelevance to this proceeding, the Commission should not require its disclosure here.

If the Commission were to require production of this cost study — and it should not — then the Commission should also require Sprint and AT&T to produce documents and data that they have withheld in this proceeding. In particular, while Sprint and AT&T suggest in their comments that their cost estimates are based on actual experience, in fact they have failed to produce any information showing the actual costs of operating their nationwide payphone businesses. Instead, they have relied on snippets of data (such as using the cost of their cheapest payphone, rather than the average cost of all payphones), and have ignored others (such as relying on the APCC's call counts, instead of their own). But AT&T's and Sprint's actual costs clearly are relevant — more relevant than an incremental cost study relating to a single state — to the cost-based standard they urge upon the Commission. Bell Atlantic, therefore, requests that, if it is required to produce the Massachusetts cost study, that Sprint and AT&T be required to produce their books showing their actual payphone costs as well.

1. THE COMMISSION SHOULD DENY SPRINT'S MOTION.

In its August 26 comments, Sprint relied on the results of a confidential cost study submitted by Bell Atlantic to the Massachusetts DPU, apparently without making any effort whatsoever to determine what methodology the Massachusetts DPU had required Bell Atlantic to employ. Had Sprint conducted any investigation, it would have learned that the Massachusetts

DPU requires that public utilities seeking rate increases submit incremental cost studies.[3] Indeed, in case after case, and for service after service, the Massachusetts DPU has required Bell Atlantic to submit incremental cost studies.[4] And that is precisely the type of study Bell Atlantic submitted there.[5]

A. Sprint Should Not Be Allowed To Avoid the DPU Protective Agreement by an Appeal to the Commission.

Sprint's motion is a collateral attack on the DPU's procedures. As Sprint concedes, it was the DPU that placed Bell Atlantic's study under seal. And it was pursuant to the DPU's procedures that parties reviewing the submission are barred from using it in any proceeding other than the one in Massachusetts.[6] If Sprint believes that the seal on the study should be broken and that the study should be used for proceedings other than the one for which it was prepared, then Sprint should address that request to the Massachusetts DPU. It should not ask this Commission to over-ride that state agency's confidentiality procedures (and undermine the confidentiality that the DPU guaranteed Bell Atlantic) without so much as petitioning the state agency for relief first.

Sprint nowhere in its motion addresses the effect that unsealing that study, and using it in this proceeding, would have on the substantive policies which caused the DPU to put the study

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3 *Investigation into IntraLATA and Local Exchange Competition in Massachusetts*, DPU 94-185-A, at 6 (March 31, 1997) ("March 31, 1997, DPU Order").

4 *See id.* at 9; *Petition for New England Telephone and Telegraph Company d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Massachusetts Intrastate Telecommunications Services*, DPU 94-50, at 205-206 (1995); *Investigation into IntraLATA and Local Exchange Competition in Massachusetts*, DPU 94-185, at 15-16 (Aug. 29, 1996) ("Aug. 29, DPU Order").

5 Reply Comments of the RBOC/GTE/SNET Coalition at 20 (Sept. 9, 1997); Reply Report of Arthur Andersen at 2-3 (attached to Coalition Reply Comments).

6 Sprint Motion at 1-2 (study confidential and could be obtained "only by agreeing to restrict its use to that DPU proceeding").

under seal and prohibit its use outside the single Massachusetts proceeding. There can be no doubt that granting Sprint's request would adversely affect the policies, including the protection of confidential company information — not to mention preventing the misuse of studies in other proceedings — on which the Massachusetts DPU's rules are based.

Sprint merely seeks to bootstrap its own inappropriate reliance on a sealed cost study into an excuse for breaking the seal. Nobody forced Sprint to rely on the Massachusetts cost study. It chose to, despite the fact that the study was under seal, in an effort to score debater's points in favor of an unrealistically low per-call compensation rate. Sprint should not be permitted to parlay its reliance on a sealed study into an excuse for breaking that seal and revealing Bell Atlantic's confidential data.[7]

B. Because the Cost Study Relies on Incremental Costs Rejected by the Commission, There Is No Reason To Compel Production.

There can be no dispute that the cost study is an incremental cost study. Because the Commission has specifically rejected reliance on incremental cost studies, the Massachusetts study is not probative in this proceeding. In fact, as the RBOC/GTE/SNET Coalition has shown, it is also not probative because costs in Massachusetts are not representative of costs in other states.

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[7] Alternatively, Sprint argues that, if the cost study is not unsealed, the Commission must accept Sprint's assertions that the cost study is not incremental (or that it at least takes such a broad view of "incremental" costs so as to be tantamount to a total cost study). Sprint Motion at 3. But Sprint cites not a single Commission or judicial precedent — or any logical argument — supporting such a preposterous demand. No rule anywhere requires parties to a notice-and-comment rulemaking to submit confidential studies, breaking the state agency seal on the study, simply because *another commenter* inappropriately relied on the study's results, declined to seek relief from the order that put the study under seal, and failed to note clear and unequivocal law requiring that the study be performed using a particular methodology.

It is indisputable that Massachusetts required Bell Atlantic to submit an incremental cost study. In no uncertain terms, the Massachusetts DPU has stated that "it is appropriate to use *LRIC [long-run incremental cost] as a basis for determining the prices* and price floors for NYNEX's competitive services."[8] As a matter of firm policy, the DPU requires incremental cost studies when examining rates for competitive and so-called "monopoly" or "essential" services alike.[9] This cannot be a surprise to Sprint, which is a regular participant in Massachusetts DPU proceedings.

Because the Massachusetts cost study looks only to incremental costs, it is irrelevant to this case. The Commission has rejected any measure of compensation based on incremental costs. As the Commission explained, and explained repeatedly, it is inappropriate to rely on a methodology — like that used in the Massachusetts incremental cost study — "under which a

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[8] March 31, 1997, DPU Order, at 6 (emphasis added); *see id.* at 9 ("LRIC [long-run incremental cost] is the appropriate basis for determining prices . . . for NYNEX's [competitive] services").

[9] *See id.* at 9 ("In *Local Competition*, we found that TSLRIC was the appropriate methodology to use to determine prices for NYNEX's monopoly/essential services, for computing price floors for monopoly services, and for measuring subsidies, and that LRIC was the appropriate methodology to use to determine prices and price floors for non-essential services"); *Petition for New England Telephone and Telegraph Company d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Massachusetts Intrastate Telecommunications Services*, DPU 94-50, at 205-206 (1995) ("For those services where NYNEX controls an essential input for a competitor's offering of a competing service, in order to prevent anti-competitive pricing, the proper price floor for NYNEX's own rate element shall consist of the relevant wholesale rate that at least one competitor pays to NYNEX in order to offer the service, and NYNEX's marginal cost of related overhead. For all other services, in order to prevent cross-subsidization, the proper price floor shall be the marginal cost . . . ."); Aug. 29, 1996 DPU Order at 14 ("[T]otal service long-run incremental cost [TSLRIC] is appropriate to use as a basis for determining the prices of NYNEX's monopoly/essential services . . . .").

carrier is compensated only for the incremental cost of providing each service individually without a reasonable allocation of common costs."[10]

Even setting aside the costing methodology, the Massachusetts study is irrelevant, as Massachusetts costs and call volumes are not representative of costs and call volumes in other states. As the Coalition already demonstrated, and Sprint has not disputed, the monthly line charge paid by Massachusetts PSPs (including Bell Atlantic's PSP) is less than half the charge paid by Vermont PSPs, and less than 60 percent of the average rate paid in BellSouth's territory.[11] Similarly, Massachusetts call volumes are much higher than those in most states — nearly double those of neighboring Rhode Island, for example -- again lowering Massachusetts per-call costs compared to other states.[12] Nowhere does Sprint explain why the unrepresentative, incremental costs of providing payphone service in a single, largely urbanized state should determine the per-call rate in rural states like West Virginia or Wyoming. The statute requires "fair" compensation for "each and every" call no matter where it originates, not nationwide compensation based on the incremental costs of providing service in the Commonwealth of Massachusetts.

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[10] *Recon. Order*, 11 FCC Rcd at 21268 ¶ 69 (emphasis added). Similarly, *Report and Order*, 11 FCC Rcd at 20576 ¶ 68 ("We conclude that use of a purely incremental cost standard for all calls could leave PSPs without fair compensation for certain types of payphone calls."); *Recon. Order*, 11 FCC Rcd at 21268 ¶ 69 (incremental cost approach "would not allow the carrier to recover the total costs of providing all of the services").

[11] Reply Comments of the RBOC/GTE/SNET Payphone Coalition at 21.

[12] *Id.* at 21-22.

C. A Firm's Costs Are Competitively Sensitive Information and Should Not Be Disclosed to the Firm's Competitors.

The Massachusetts DPU protects the cost study for good reason — few pieces of information are as competitively sensitive as a firm's costs. For example, this study contains a break-down of Bell Atlantic's investment in its payphone business in Massachusetts, as well as details of its operating expenses, including commissions paid to premises owners. Courts and regulatory agencies recognize the highly proprietary nature of such information and do not release one firm's cost data to its competitors. Sprint has suggested no reason why the DPU's procedure is wrong in this case or why the information in the Massachusetts study is not of the sort that should be kept confidential.[13]

2. IF THE COMMISSION REQUIRES BELL ATLANTIC TO PRODUCE ITS DATA, IT SHOULD REQUIRE AT&T AND SPRINT TO DO LIKEWISE.

If the Commission were to consider compelling the production of the Massachusetts cost study, then it should also require AT&T and Sprint to submit their actual costs and call volumes for inspection and review by the parties. Although both those carriers offered scattered bits of "data" concerning their costs in running their payphone businesses, neither submitted any complete studies, and both intentionally distorted the results. AT&T, for example, used an average cost per phone of $225, even though the vast majority of its phones cost many times that amount. Indeed, AT&T excluded not only the costs of its most expensive payphones (its extremely fancy and undoubtedly very expensive Phonetel 2000), but also all its overhead and administrative expenses. Moreover, AT&T further depressed its per-call cost estimates by

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[13] If the Commission were to require production in this proceeding, it should also be under a protective agreement.

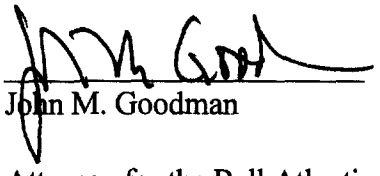
relying on APCC call volume data even though AT&T's payphones are likely to — like most Coalition payphones — have lower volumes.[14]

At the same time AT&T and Sprint argue for cost-based rates, they have withheld from the Commission critical evidence of costs, namely their actual costs of providing payphone service. Consequently, if the Commission believes that Bell Atlantic's confidential, sealed *incremental* cost study for a *single*, unrepresentative state is relevant and must be produced, it should require AT&T and Sprint to produce their nationwide cost data as well.

Conclusion

Sprint's request that the Commission require the unsealing of Bell Atlantic's incremental Massachusetts cost study should be denied.

Respectfully submitted,



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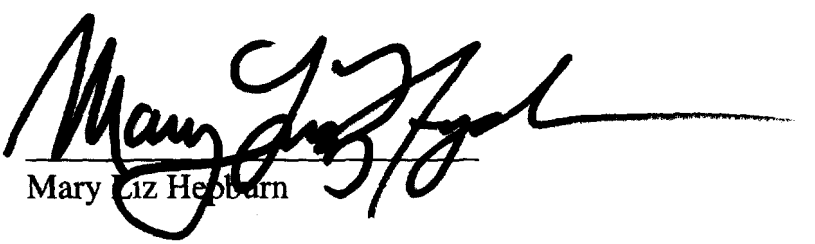
Dated: September 26, 1997

[14] See Andersen Reply Report at 5-7.

CERTIFICATE OF SERVICE

I, Mary Liz Hepburn hereby certify that on this 26th day of September, 1997, a copy of the foregoing Bell Atlantic "Opposition to Sprint's Motion to Require Production of a Confidential Cost Study and Conditional Cross-Motion for Production of Payphone Cost Data from Sprint and AT&T" in CC Docket No. 96-128 was served on the party listed below by first class U.S. mail, postage prepaid.



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